Supreme Court, U.S.
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No. 87-105

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

GEORGE F. COMBS,

Petitioner,

vs.

SEABOARD SYSTEM RAILROAD, INC.,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF KENTUCKY

RESPONDENT'S BRIEF IN OPPOSITION

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COUNTERSTATEMENT OF QUESTIONS PRESENTED

I. Whether there were factual issues sufficient to require intervention of a jury.

II. Whether the trial court and the Court of Appeals correctly applied the law under 45 USC § 51 to the facts as given.

III. Whether review by this Court will assist lower courts in deciding cases under the Federal Employers' Liability Act.

TABLE OF CONTENTS

	Page
COUNTERSTATEMENT OF QUESTIONS PRESENTED	I
TABLE OF AUTHORITIES	IV
OPINIONS BELOW	1
COUNTERSTATEMENT OF THE CASE	1
SUMMARY OF ARGUMENT	4
ARGUMENT	4
CONCLUSION	9
APPENDIX A OPINION OF COURT OF APPEALS OF KENTUCKY	1a

TABLE OF AUTHORITIES

Cases Page

Atchison, T. & S.F.R. Co. v. *Wottle*, 193 F. 2d 628 (10th Cir. 1952), cert. granted, 343 U.S. 963, cert. dismissed by stipulation, 344 U.S. 816 (1952) 5, 6

Branti v. *Finkel*, 100 S.Ct. 1287, 445 U.S. 507, 63 L. Ed. 2d 574 (1980) 8

Drumheller v. *Berks County Local Board No. 1*, 130 F.2d 610 (3rd Cir. 1949) 8

Fowler v. *Seaboard Coastline R. Co.*, 638 F.2d 17 (5th Cir. 1981) 5, 6

Getty v. *Boston and Maine Corporation*, 505 F.2d 1226 (1st Cir. 1974) 6

National Collegiate Athletic Association v. *Board of Regents of University of Oklahoma*, 104 S.Ct. 2948, 82 L.Ed.2d 70 (1984) 8

Quirk v. *New York C. & St. L.R. Co.*, 189 F.2d 97 (7th Cir. 1951), cert. denied, 342 U.S. 871 (1951) 8

Sinkler v. *Missouri & Pacific Railroad*, 356 U.S. 326, 2 L.Ed. 1152 (1958) 7

Statutes

Federal Employers' Liability Act, 45 U.S.C. § 51 et seq. 7

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OPINIONS BELOW

It should be noted that the opinion of the Court of Appeals of Kentucky is "Not to be Published" (Appendix A), and therefore will not be reported, and will not be binding authority in any subsequent action.

COUNTERSTATEMENT OF THE CASE

Tersely stated, this is not a usurpation of a jury province by a state court judge. If the facts are undisputed, as in this case, the trial court must determine the question of law, which is whether the plaintiff was within the scope of employment by the defendant.

It is true that the trial court (Commonwealth of Kentucky — Whitley County Circuit Court) granted a motion for summary judgment against the plaintiff employee in favor of the defendant railroad. This ruling was sustained upon appeal by the Kentucky Court of Appeals, and the Kentucky Supreme Court denied discretionary review. What is overlooked by the plaintiff-petitioner is that in making this summary judgment, the trial court relied solely on and accepted the testimony of the plaintiff as to what happened on the night in question. Thus, there could be no material issue of fact. There could be no issue of fact period. The only issue that was decided by the trial court was the legal issue: Was the plaintiff within the scope of his employment for purposes of maintaining an action under the Federal Employers' Liability Act, 45 U.S.C. § 51?

Petitioner, George F. Combs, had been a conductor for the SEABOARD SYSTEM RAILROAD, INC. since 1964. He testified that on December 27, 1983, he and approximately eight other men were taken from Covington, Kentucky to Corbin, Kentucky for the purpose of conducting a train from Corbin back to Covington. Combs arrived in Corbin at approximately 12:15 p.m. and reported directly to the train master who told Mr. Combs to take his eight hour rest period and be prepared to report back for duty at 8:45 p.m. At this time, Mr. Combs went to the Corbin Motor Lodge, where Seaboard had secured rooms for its employees, and unpacked. By Mr. Combs' own testimony, at this time he was on his own, and could do anything that he pleased until he was to report back to work at 8:45 p.m. It is important to note that Mr. Combs was not on call, was not instructed to remain on the premises, and that Seaboard had no control over his activity until such time as he was to return to his room at 8:45 p.m. After unpacking, Mr. Combs and a friend proceeded to the D & W Restaurant in a shopping center on the east side of town. After eating at the restaurant, they browsed in a book store for awhile and then proceeded, in Mr. Combs' personal automobile, to the restaurant adjacent to the Corbin Motor Lodge, arriving there at approximately 7:00 p.m. After hav-

ing a cup of coffee at the restaurant, it was Mr. Combs' intention to proceed to the funeral home in town where services were being held for an old friend of his. After visiting the funeral home, he was then going to return to his room at 8:45 p.m. and await his call to duty. Unfortunately, upon entering the restaurant adjacent to the Corbin Motor Lodge, Mr. Combs found that it was entirely too crowded, due to the inclemate weather conditions at that time, and upon exiting the restaurant, Mr. Combs slipped on the ice causing the injuries complained of herein.

No other evidence was before the court and therefore all of the above facts, as stated by the petitioner, were uncontroverted.

SUMMARY OF ARGUMENT

1. The trial court accepted the version of facts as supplied by the petitioner, and merely applied the law to those facts. Thus, the trial court did not invade the province of the jury.

2. The trial court correctly applied the law that an employee performing a private activity for a private purpose is not acting within the scope of his employment.

3. Whether or not a particular employee is acting within the scope of his employment is necessarily decided on a case-by-case basis, and review here will do little, if anything, to assist lower courts.

ARGUMENT

THE TRIAL COURT ACCEPTED THE VERSION OF FACTS AS SUPPLIED BY THE PETITIONER, AND MERELY APPLIED THE LAW TO THOSE FACTS. THUS THE TRIAL COURT DID NOT INVADE THE PROVINCE OF THE JURY.

It needs no citation of authority to know that once facts are established the trial judge applies the law to those facts. That is exactly what happened in the case below. The trial judge decided no factual issue, but merely accepted the facts as were testified to by the petitioner himself.

Contrary to the assertion made in the petition for certiorari, the petitioner was not on the premises of the hotel where he was boarded by the defendant at the time the accident occurred. He was at a restaurant adjacent to the hotel. More importantly, he was not at the restaurant to eat and then return to work, or to wait for a call to work. The petitioner's own frank and candid version of the events of that evening was that he was on his way to funeral visitation for a deceased friend when, while walking down the sidewalk of the restaurant, he slipped and fell.

The trial judge accepted the petitoner's uncontroverted version of these facts and entered judgment based on those facts. There simply is no factual issue here.

THE TRIAL COURT CORRECTLY APPLIED THE LAW THAT AN EMPLOYEE PERFORMING A PRIVATE ACTIVITY FOR A PRIVATE PURPOSE IS NOT ACTING WITHIN THE SCOPE OF HIS EMPLOYMENT.

It is established law that in order for a plaintiff to recover under a Federal Employers' Liability Act claim, he must show:

1. That the defendant is a common carrier by a railroad engaged in interstate commerce;

2. That the plaintiff was employed by the defendant with the duties furthering such commerce;

3. That the injuries were sustained while the plaintiff was so employed; and

4. That the injuries were the result of negligence of the defendant company. 45 USC § 51, et seq., *Fowler* v. *Seaboard Coastline Railroad Company*, 638 F2d 17, 19 (5th Cir. 1981). The defendants in this case do not question the first two elements. The third and fourth elements have been denied, and it is the third element that is the particular bone of contention with the petitioner. The petitioner contends that he was acting within the scope of his employment.

The law is settled that activities not necessarily incident to or an integral part of the plaintiff's employment in interstate commerce are not covered by the F.E.L.A. *Atchison, T. & S.F.R. Co.* v. *Wottle*, 193 F2d 628 (10th Cir. 1952). Cert. granted, 343 U.S. 963, Cert. dismissed by stipulation, 344 U.S. 816 (1952). The Act does not cover activities undertaken by an employee for a private purpose and having no causal relationship with his employment. *Id.*

In *Atchison, supra*, the plaintiff's decedent finished his day of work and left the toll house where the railroad employees roomed at the railroad's expense; he was free to do as he pleased during his off-time — just as the petitioner was in this case. The plaintiff and a roommate traveled by automobile twelve miles to pick up groceries and bedding, and died in a collision en route. The court stated that the plaintiff was "on a mission wholly unconnected and unrelated to his employment, and his injury while thus engaged cannot be said to be in commerce within the meaning of the Act." 193 F2d at 631. The Court also reiterated the limitations of the Act in stating that:

> Given its most liberal interpretation, the Act cannot be extended to cover activities not necessarily incident to or an integral part of employment in interstate commerce. It obviously does not cover activities undertaken by an employee for a private purpose and having no causal relationship with his employment. *Id.* at 630.

In *Fowler* v. *Seaboard Coastline Railroad*, 638 F.2d 17 (5th Cir. 1981), the employees were given a paid lunch break. The plaintiff's decedent in *Fowler*, after eating lunch, went outside to examine a motorcycle, which he then rode. The employee was thrown from the motorcycle and killed. On appeal, the court upheld the findings of the trial judge that the motorcycle excursion was a purely private activity, totally unrelated to the employment, and therefore not covered by the Act.

In *Getty* v. *Boston and Maine Corporation*, 505 F2d 1226 (1st Cir. 1974), a railroad employee brought an action against the railroad under the F.E.L.A. to recover for injuries sustained when he fell walking toward the train station platform, where he intended to board a train to travel to his work place. The court held that the employee was not covered by the F.E.L.A., stating, "absent circumstance indicating a special arrangement with one's employer, subjective conditions resulting from employee choices of where to live and how to travel are insufficiently related to employment to

determine the coverage of the federal statute." 505 F2d at 1228.

Similarly, the injury to the petitioner in this case is attributable to a decision over which the railroad had no control. The petitioner's injury was purely the product of his own subjective whims of where to eat and where to go. As was admitted by the petitioner himself, the railroad did not require him to eat at a particular restaurant, nor did it require him to spend his off-duty time in any particular manner.

This court in *Sinkler* v. *Missouri Pacific Railroad*, 356 U.S. 326, 2 L.Ed. 1152 (1958), stated that the FELA "was a response to the special needs of railroad workers who are daily exposed to the risks inherent in railroad work and are helpless to provide adequately for their own safety." *Id.* at 329. It was clearly not the intention of the Act to cover injuries sustained in activities wholly unrelated to the railroad employee's employment.

WHETHER OR NOT A PARTICULAR EMPLOYEE IS ACTING WITHIN THE SCOPE OF HIS EMPLOYMENT IS NECESSARILY DECIDED ON A CASE-BY-CASE BASIS, AND REVIEW HERE WILL DO LITTLE, IF ANYTHING, TO ASSIST LOWER COURTS.

The petitioner requests the Court to grant certiorari in order to lay down a broad and bold rule defining more clearly what constitutes "scope of employment" for purposes of the Federal Employers' Liability Act, 45 USC § 51, et seq.

A grant of certiorari in this case would do little, if anything, to aid the lower courts. This is because each case involves different facts, and thus must necessarily be decided on a case-by-case basis. It is the contention of the respondent that the lower courts know what the law is and are doing a good job at the difficult task of applying the law to the myriad fact patterns that arise under it. The only conflict is over the facts of a case. Trial judges and appellate court

judges, human beings that they are, will necessarily take opposing views of different fact patterns. That does not mean that they are in conflict as to what the law is.

The Whitley County Circuit Court looked at the undisputed facts of this case and determined as a matter of law that Mr. Combs was not within his scope of employment at the time of the accident. A Writ of Certiorari is not proper in this case because it has long been the settled policy of the Supreme Court not to review factual determinations in which both the trial court and the appellate court have concurred. *Branti* v. *Finkel*, 100 S.Ct. 1287, 445 U.S. 507, 63 L.Ed.2d 574 (1980). It has been repeatedly stated that a Writ of Certiorari will not lie for the purpose of reviewing conclusions of fact or findings of fact and that the Supreme Court accords great weight to the fact finding made by the trial court and approved by the appellate court. *Drumheller* v. *Berks County Local Board No. 1*, 130 F.2d 610 (3rd Cir., 1949); *National Collegiate Athletic Association* v. *Board of Regents of University of Oklahoma*, 104 S.Ct. 2948, 82 L.Ed.2d 70 (1984).

In any event, if the definition of "within the scope of employment" is to have any reasonable meaning of limitation, there is no justifiable way to stretch the facts of this case to bring the petitioner within the scope of employment.

> We are not unmindful of the liberal interpretation which the courts have placed, and properly so, upon the Federal Employer's Liability Act, designed for the benefit and protection of railroad employees but, even so, there is a point beyond which its application must be denied. Plaintiff's position in the instant case, if accepted, would come close to stripping it of any limitation." *Quirk* v. *New York C. and St. L.R. Co.*, 189 F2d 97 at 101 (7th Cir. 1951), cert. denied 342 U.S. 871 (1951).

If the Court were to accept Petitioner's theory, there would be no limitation upon coverage of the Act. As the Com-

monwealth of Kentucky Court of Appeals so aptly stated in affirming the judgment of the Whitley Circuit Court:

> We are . . . convinced Mr. Combs' activities at the time of the accident were in no way work related. *Under appellant's [Petitioner herein] interpretation, Mr. Combs would have been covered by FELA if he had injured himself bowling.* Our credulity simply does not stretch far enough to cover this contention. The railroad was not directing Mr. Combs' activities at the time of the accident; he was, as he stated, "on his own" for eight hours. His activities cannot be construed as even approaching the "scope of employment" essential to coverage under the Act. (Emphasis added).

CONCLUSION

For the reasons above, the respondent respectfully requests that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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APPENDIX A

COMMONWEALTH OF KENTUCKY
COURT OF APPEALS
NO. 86-CA-741-S

GEORGE F. COMBS
APPELLANT

vs.

LOUISVILLE & NASHVILLE RAILROAD COMPANY,
SEABOARD SYSTEM RAILROAD, INC. and
CORBIN MOTOR LODGE
APPELLEES

Appeal From Whitley Circuit Court
Honorable Emby A. McKeehan, Judge
Action No. 84-CI-535

AFFIRMING IN PART — REVERSING IN PART
(Opinion rendered December 12, 1986, 10:00 a.m.)
NOT TO BE PUBLISHED

* * *

BEFORE: HAYES, Chief Judge, HOWERTON and REYNOLDS, Judges

HAYES, CHIEF JUDGE: The question presented is whether the trial court erred in summarily disposing of appellants' claims for damages stemming from a fall on ice on the premises of Corbin Motor Lodge. We are convinced that summary judgment is inappropriate insofar as the negligence claim against Corbin Motor Lodge is concerned, but appellants' claim under the Federal Employees Liability Act was properly dismissed.

We agree with appellants' contention that since the advent of comparative negligence in this state, *Hilen* v. *Hayes*, Ky., 673 S.W.2d 713 (1984), proof of some degree of negligence on the plaintiff's part no longer operates to bar his claim. Fault becomes a question of degree and measuring the degree of each parties' fault is the province of the jury. Here, we find a plaintiff who followed other patrons in traversing an icy entrance to a restaruant on the Lodge's premises and a business establishment which has allowed ice to accumulate on its sidewalk. Reasonable minds could differ as to the degree of negligence present in each parties' actions and thus the finder of fact is asked to compare the fault of one to that of the other. We are convinced it was error for the trial judge to usurp this function.

Appellants also asserted a claim against L & N and Seaboard for negligence in failing to provide Mr. Combs a safe workplace. The railroad maintains that the trial judge properly dismissed this claim as appellant was not performing his duties or engaging in activities incident thereto at the time of his injury. We agree.

In his testimony, Mr. Combs admitted he was on his own free time for eight hours. We are mindful of the relationship the railroad maintained with the motel, but we are nevertheless convinced Mr. Combs' activities at the time of the accident were in no way work related. Under appellants' interpretation, Mr. Combs would have been covered by FELA if he had injured himself bowling. Our credulity simply does not stretch far enough to cover this contention. The railroad was not directing Mr. Combs' activities at the time of the incident; he was, as he stated, "on his own" for eight hours. His activities cannot be construed as even approaching the "scope of employment" essential to coverage under the Act.

We are cited to cases which appear to go in opposite directions in terms of FELA coverage for activities undertaken during off-duty or enforced rest periods. We have opted to align ourselves with reasoning set forth in *Fowler* v. *Seaboard Coastline R. Co.*, 638 F.2d 17 (5th Cir. 1981), which holds that when an employee undertakes a purely private activity,

even upon his employer's premises, he is denied recovery under FELA. In the instant case, Mr. Combs had stopped for a cup of coffee and was on his way to visiting hours at a funeral home when he was injured. We believe this is purely private activity outside the protection of FELA.

The judgment of the Whitley Circuit Court, as to appellees L & N Railroad Company and Seaboard System Railroad, is hereby affirmed. The judgment as to Corbin Motor Lodge is reversed and the case remanded for further proceedings.

Further, pursuant to 2.(a) of the Order designating the Case as a Special Appeal, the application of CR 76.20 and CR 76.32, as well as other appropriate Rules of Civil Procedure pertaining to further appellate steps, are reinstated effective the date of this opinion.

ALL CONCUR.

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